



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 244, and 252

RIN 0750-AH39

Defense Federal Acquisition Regulation Supplement:

Applicability of Hexavalent Chromium Policy to Commercial Items

(DFARS Case 2011-D047)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to clarify the applicability to commercial items of DoD policies relating to the use of materials containing hexavalent chromium.

DATES: Comment Date: Comments on the proposed rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the **FEDERAL REGISTER**], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2011-D047, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by

inputting "DFARS Case 2011-D047" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2011-D047." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2009-D047" on your attached document.

- o E-mail: dfars@osd.mil. Include DFARS Case 2011-D047 in the subject line of the message.

- o Fax: 703-602-0350.

- o Mail: Defense Acquisition Regulations System, Attn: Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 703-602-0328.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a final rule at in the Federal Register at 76 FR 25569 on May 5, 2011, to implement in the Defense Federal

Acquisition Regulation Supplement (DFARS) the DoD policy addressing the serious human health and environmental risks related to the use of hexavalent chromium. Hexavalent chromium is a chemical that has been used in numerous DoD weapons systems platforms due to its corrosion protection properties. However, hexavalent chromium is a known carcinogen. The final rule minimized the use of materials containing hexavalent chromium in items acquired by DoD, including the creation of a new DFARS clause, 252.223-7008, Prohibition of Hexavalent Chromium, which prohibits the contractor from providing any deliverables or construction material that—

(1) Contains hexavalent chromium in a concentration greater than 0.1 percent by weight in any homogeneous material; or

(2) Requires the removal or reapplication of hexavalent chromium materials during subsequent sustainment phases of the deliverable or construction material.

The final rule prescribed use of the clause in solicitations and contracts for supplies, maintenance and repair services, or construction, unless an exception at DFARS 223.7304 applies or use has been authorized in accordance with DFARS 223.7305.

II. Discussion and Analysis

The preamble to the final rule stated the clear intent that the rule should apply to commercial items. In response to a

respondent who requested an exception for all commercial items, DoD stated that to provide an exception for all commercial items will jeopardize the intent of the rule and be contrary to DoD policy (section II.F.).

However, although the final rule did not specify an exception for commercial items, the rule overlooked the need to separately prescribe the clause in part 212 in order to require use of the clause in acquisitions conducted under part 212. FAR 12.301(d)(1) states that prescriptions contained elsewhere in the FAR do not apply to acquisitions under FAR part 12, unless separately included in FAR part 12.

Therefore, this rule proposes to correct that oversight and provide at DFARS 212.301(f) the requirement for use of DFARS 252.223-7008 in contracts for the acquisition of commercial items, as prescribed at 223.7306. In addition, in order to flow the requirement down to commercial subcontracts under a noncommercial prime contract, the clause DFARS 252.223-7008 must be added to the list of clauses in DFARS 252.244-7000, Subcontracts for Commercial Items and Commercial Components (DoD Contracts).

In addition, the prescription at DFARS 244.403 for use of 252.244-7000 was simplified, so that DFARS 244.403 does not require update every time a clause is added to the list in 252.244-7000 for flow down to subcontracts for commercial items.

Further, 252.244-7000 states that the listed clauses shall flow down when applicable. This rule augments the list of clauses in 252.244-7000 with indication of the conditions of applicability for each clause.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule is just correcting a drafting oversight in the rule published on May 5, 2011. DoD certified that that rule would not have a significant economic impact on a

substantial number of small entities. Therefore, an initial regulatory flexibility analysis has not been performed. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 201X-D047), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 212, 244, and 252

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulation Supplement

Therefore DoD proposes to amend 48 CFR parts 212, 244, and 252 as follows:

1. The authority citation for 48 CFR parts 212, 244, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212 - ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by-

(a) Redesignating paragraphs (f)(iv)(E) through (L) as paragraphs (f)(iv)(F) through (M); and

(b) Adding new paragraph (f)(iv)(E) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

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(E) Use the clause at 252.223-7008, Prohibition of Hexavalent Chromium, as prescribed at 223.7306.

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PART 244-SUBCONTRACTING POLICIES AND PROCEDURES

3. Revise section 244.403 to read as follows:

244.403 Contract clause.

Use the clause at 252.244-7000, Subcontracts for Commercial Items and Commercial Components (DoD Contracts), in solicitations and contracts for supplies or services other than commercial items that contain any of the clauses listed in the clause at 252.244-7000.

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 252.244-7000 to read as follows:

252.244-7000 Subcontracts for Commercial Items and Commercial Components (DoD Contracts).

As prescribed in 244.403, use the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS (DOD CONTRACTS) (DATE)

In addition to the clauses listed in paragraph (c) of the Subcontracts for Commercial Items clause of this contract (Federal Acquisition Regulation 52.244-6), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

(a) 252.223-7008, Prohibition of Hexavalent Chromium, if the subcontract is for supplies, maintenance and repair services, or construction materials.

(b) 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals (JAN 2011) (10 U.S.C. 2533b), if flow down is required in accordance with paragraph (e) of DFARS clause 252.225-7009.

(c) 252.225-7039, Contractors Performing Private Security Functions (AUG 2011) (Section 862 of Pub. L. 110-181, as amended by section 853 of Pub. L. 110-417 and sections 831 and 832 of Pub. L. 111-383), if the subcontract will be performed in areas of contingency operations, complex contingency operations, or other military operations or exercises designated by the Combatant Commander.

(d) 252.227-7015, Technical Data-Commercial Items (SEP 2011),

if applicable (see 227.7102-4(a)), if flow down is required in accordance with paragraph (e) of DFARS clause 252.227-7015.

(e) 252.227-7037, Validation of Restrictive Markings on Technical Data (SEP 2011), if applicable (see 227.7102-4(c)), if the subcontract or supplier at any tier requires the delivery of technical data.

(f) 252.236-7013 Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers (JAN 2009) (Pub. L. 110-329, Division E, Section 108), if the subcontract involves the acquisition of steel as a construction material.

(g) 252.237-7010 Prohibition on Interrogation of Detainees by Contractor Personnel (NOV 2010) (Section 1038 of Pub. L. 111-84), if the subcontract may require subcontractor personnel to interact with detainees in the course of their duties.

(h) 252.237-7019 Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Pub. L. 108-375), if the subcontract may require subcontractor personnel to interact with detainees in the course of their duties.

(i) 252.246-7003 Notification of Potential Safety Issues (JAN 2007), if flow down is required in accordance with paragraph (f) of DFARS clause 252.246-7003.

(j) 252.247-7023 Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631), if flow down is required in accordance with paragraph (h) of DFARS clause 252.247-7023.

(k) 252.247-7024 Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631), if flow down is required in accordance with paragraph (b) of DFARS clause 252.247-7024.

(End of clause)

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